Joy Luck Palace Inc. d/b/a Joy Luck Palace Restaurant *and* 318 Restaurant Workers Union. Cases 02–CA–213541, 02–CA–216489, and 02–CA–221921

October 30, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

The General Counsel seeks a default judgment in this case on the ground that Joy Luck Palace Inc. d/b/a Joy Luck Palace Restaurant (the Respondent) has failed to file an answer to the complaint or the amended complaint. Upon charges and amended charges filed by 318 Restaurant Workers Union (the Union) on January 23, March 12, April 16, June 11, and July 31, 2018, the General Counsel issued a complaint on September 28, 2018, and an amended complaint on January 18, 2019, against the Respondent, alleging that it has violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act. The Respondent failed to file an answer to either the complaint or the amended complaint.[1]

On March 1, 2019, the General Counsel filed a Motion for Default Judgment with the Board. On March 6, 2019, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint and amended complaint affirmatively state that an answer must be received on or before October 12, 2018, and February 1, 2019, respectively, and that if no answer is filed, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint and amended complaint are true. Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letter dated February 6, 2019, notified the Respondent that unless an answer was received by February 12, 2019, a motion for default judgment would be filed. Nevertheless, the Respondent failed to file an answer.

In the absence of good cause being shown for the failure to file an answer, we deem the allegations in the amended complaint to be admitted as true, and we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times until about August 2018, the Respondent was a corporation with a place of business located at 98 Mott Street in New York, New York, and was engaged in the business of operating a restaurant.

In conducting its operations until about August 2018, the Respondent annually derived gross revenue in excess of $500,000 and purchased goods valued in excess of $5000 directly from suppliers located outside the State of New York.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] The motion for default judgment and related exhibits indicate that the Region served the charges and amended charges by regular mail on the Respondent at its place of business. The Region served the complaint by certified mail on the Respondent at its last known address, and tracking information provided by the United States Postal Service (USPS or Postal Service) confirmed delivery; it also sent the complaint by electronic mail to the Respondent's president/owner and its manager via email addresses that those officials had previously used to correspond with the Region. The Region sent a letter, reminding the Respondent of its obligation to answer the complaint, by regular mail to the Respondent's last known address and emailed the letter to the Respondent's president/owner and its manager. The Region served the amended complaint by certified mail on the Respondent at its last known address (although the zip code in the address on the letter was incorrect, USPS tracking information confirmed that it was delivered but "refused") and on the Respondent's president/owner at his home address (no one was present to receive the letter and USPS left a notice requesting that the addressee reschedule delivery, but he did not). The Region also emailed the amended complaint to the Respondent's president/owner and its manager. The Region then sent another reminder letter by regular mail to the Respondent's last known address and to the Respondent's president/owner, its manager, and its former president/part owner.

It is well settled that a respondent's failure or refusal to accept certified mail or to provide for receiving appropriate service cannot serve to defeat the purposes of the Act. See *Cray Construction Group, LLC*, 341 NLRB 944, 944 fn. 5 (2004); *I.C.E. Electric, Inc.*, 339 NLRB 247, 247 fn. 2 (2003). Further, the failure of the Postal Service to return documents served by regular mail indicates actual receipt of those documents by the Respondent. Id.; *Lite Flight, Inc.*, 285 NLRB 649, 650 (1987), enfd. sub nom. *NLRB v. Sherman*, 843 F.2d 1392 (6th Cir. 1988). There is also no indication that the Region's emails to the Respondent's officials were undeliverable.

II. ALLEGED UNFAIR LABOR PRACTICES

1. At all material times, the following individuals held the positions set forth opposite their names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

> Yong Jin Chan – part-owner and president from about January 18, 2016, through about January 31, 2018
>
> Patrick Mock – part-owner since about January 2016 and president since about February 1, 2018
>
> Tony Chen – manager

2. (a) The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time dining room employees including waiters, busboys, and dim sum sellers, and excluding all kitchen employees, office clerical employees, managers, guards and supervisors as defined in the National Labor Relations Act.

(b) About March 5, 2017, a majority of the unit designated the Union as their exclusive collective-bargaining representative.

(c) Since about March 5, 2017, and at all material times, the Respondent has recognized the Union as the exclusive collective-bargaining representative of the unit.

(d) At all times since March 5, 2017, the Union has been the exclusive collective-bargaining representative of the unit employees within the meaning of Section 9(a) of the Act.

3. In September 2017, the Respondent, by Tony Chen, at the restaurant, threatened to deny employees the ability to switch days off with other employees because of their support for or activities on behalf of the Union.

4. (a) At various times from about March 5 to December 21, 2017, the Respondent and the Union met for the purpose of negotiating an initial collective-bargaining agreement with respect to wages, hours, and other terms and conditions of employment.

(b) About December 21, 2017, the Union and the Respondent reached complete agreement on the unit's terms and conditions of employment to be incorporated in a collective-bargaining agreement.

(c) Since about December 21, 2017, the Union requested that the Respondent execute a written contract containing the agreement described above in subparagraph 4(b).

(d) Since about January 1, 2018, the Respondent, by Yong Jin Chan, has failed and refused to execute the agreement described above in subparagraph 4(b).

(e) Since about February 1, 2018, the Respondent, by Patrick Mock, has failed and refused to execute the agreement described above in subparagraph 4(b).

5. (a) From February 1 to 26, 2018, the Respondent partially shut down its operation by ceasing its dim sum and dinner service.

(b) The subjects set forth above in subparagraph 5(a) relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purpose of collective bargaining.

(c) The Respondent engaged in the conduct described above in subparagraph 5(a) without prior notice to the Union, and without affording the Union an opportunity to bargain with the Respondent with respect to the effects of this conduct.

(d) The Respondent engaged in the conduct described above in subparagraph 5(a) because its employees assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

6. (a) On or about May 22, 2018, the Respondent, by Patrick Mock, stated that the restaurant would fully shut down its business operation for financial reasons on an unspecified date.

(b) By letter dated May 24, 2018, the Union requested that the Respondent bargain collectively with the Union as the exclusive collective-bargaining representative of the unit over the effects of the planned closing.

(c) The subjects set forth above in subparagraph 6(a) relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining.

(d) Since about May 24, 2018, the Respondent has failed and refused to meet and bargain with the Union regarding the effects of its planned closure as described above in subparagraph 6(a).

7. (a) Since about May 24, 2018, the Union has requested in writing that the Respondent furnish it with the following information:

> (1) All documents that support the letter stating the restaurant is in arrears regarding the rent for the restaurant;
>
> (2) All documents including information contained electronically/digitally regarding the monthly income statements for the restaurant from January 2017 to present;
>
> (3) All documents that contain information about the monthly expenditures for the restaurant from January 2017 to present;
>
> (4) All documents that contain information about the debts currently owed by the restaurant;

(5) All documents including information contained electronically/digitally regarding the assets of the restaurant;

(6) All documents including information contained electronically/digitally identifying the owners of the restaurant;

(7) All documents including information contained electronically/digitally identifying the ownership shares of the restaurant; and

(8) All documents that contain information about the lease of the restaurant at 98 Mott Street.

(b) By the letter described above in subparagraph 7(a), the Union demonstrated to the Respondent the relevance of the information described above in subparagraph 7(a).

(c) The information requested by the Union and described above in subparagraph 7(a) is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit.

(d) Since about May 24, 2018, the Respondent, by Patrick Mock, has failed and refused to furnish the Union with the information requested by it as described above in subparagraph 7(a).

8. (a) On August 23, 2018, the Respondent closed its restaurant.

(b) As a result of the closing described above in subparagraph 8(a), the unit employees were terminated from their positions.

(c) The effects of the closing described above in subparagraph 8(a) on the unit employees relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining.

(d) The Respondent engaged in the conduct described above in subparagraph 8(a) without prior notice to the Union and without affording the Union an opportunity to bargain with respect to the effects of this conduct.

CONCLUSIONS OF LAW

1. By the conduct described above in paragraph 3, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act in violation of Section 8(a)(1) of the Act.

2. By the conduct described above in paragraph 5, the Respondent has been discriminating in regard to the hire or tenure or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act.[2]

3. By the conduct described above in paragraphs 4, 7, and 8, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) of the Act.[3]

4. The unfair labor practices of the Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent unlawfully partially shut down its operation by temporarily shutting down its dim sum and dinner service, we shall order the Respondent to make the unit employees whole for any loss of earnings and other benefits attributable to its unlawful conduct.[4] The make-whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In addition, having found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to execute and implement the agreement it reached with the Union on December 21, 2017, we shall order the Respondent to execute and implement the agreement and give retroactive effect to its terms. We shall also order the Respondent to make the unit employees whole for any loss of earnings and other benefits attributable to its failure to execute the agreement, as set forth in *Ogle Pro-*

[2] The amended complaint additionally alleges that the conduct in paragraph 5 violated Sec. 8(a)(5) and (1) of the Act. We find it unnecessary to pass on whether the Respondent's conduct in this regard also violated Sec. 8(a)(5) and (1), because finding this additional violation would not materially affect the remedy.

[3] The general financial information sought by the Union in its May 24 information request is not presumptively relevant. However, the amended complaint alleges that the Union demonstrated its relevance, and by failing to file an answer, the Respondent admitted that allegation. Moreover, by failing to file an answer, the Respondent also admitted that the requested financial information "is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit," as the amended complaint also alleges. See, e.g., *UNY LLC d/b/a General Super Plating*, 367 NLRB No. 113, slip op. at 2 (2019).

The amended complaint additionally alleges that the conduct in paragraph 6 violated Sec. 8(a)(5) and (1) of the Act. In light of our finding that the Respondent failed to bargain over the effects of its decision to close the restaurant on August 23, 2018, we find it unnecessary to pass on this allegation because it would not materially affect the remedy.

[4] Neither the complaint nor the motion has specified the impact, if any, on the unit employees of the unlawful partial shutdown. In these circumstances, we shall permit the Respondent to contest the appropriateness of a make-whole remedy for this violation.

tection Service, supra, and *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Having found that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to furnish the Union with requested information that is relevant and necessary to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit employees, we shall order the Respondent to furnish the Union with the information it requested on about May 24, 2018.

To remedy the Respondent's unlawful failure and refusal to bargain with the Union about the effects of the closing of the Respondent's facility, we shall order the Respondent to bargain with the Union, on request, about the effects of the closing. As a result of the Respondent's unlawful conduct, however, the unit employees have been denied an opportunity to bargain through their collective-bargaining representative at a time when the Respondent might still have been in need of their services and a measure of balanced bargaining power existed. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, we deem it necessary, in order to ensure that meaningful bargaining occurs and to effectuate the policies of the Act, to accompany our bargaining order with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violation and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent to pay backpay to the unit employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as clarified by *Melody Toyota*, 325 NLRB 846 (1998).[5]

Thus, the Respondent shall pay its unit employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closure on the unit employees; (2) the parties reach a bona fide impasse in bargaining; (3) the Union fails to request bargaining within 5 business days after receipt of this Decision and Order or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the Union subsequently fails to bargain in good faith.

In no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the Respondent ceased operations to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner. However, in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ.[6] Backpay shall be based on earnings that the unit employees normally would have received during the applicable period and shall be computed in accordance with *Ogle Protection Service*, supra, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Additionally, we shall order the Respondent to compensate the unit employees for any adverse tax consequences of receiving a lump-sum backpay award in accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), and to file a report with the Regional Director for Region 2 allocating the backpay award to the appropriate calendar years for each employee in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

Finally, because the Respondent's facility is currently closed, we shall order the Respondent to mail a copy of the attached notice, in English and simplified Chinese, to the Union and to the last known addresses of its former unit employees in order to inform them of the outcome of this proceeding.

[5] See also *Live Oak Skilled Care & Manor*, 300 NLRB 1040 (1990).

[6] Chairman Ring and Member Kaplan note that some Board members have disagreed with *Transmarine*'s two-week-minimum backpay requirement, beginning in *Transmarine* itself. See 170 NLRB at 391 (Member Jenkins, dissenting in part) ("Since I am unable to perceive any principle upon which my colleagues establish the minimum amount of backpay to be 'not less than' 2 weeks' pay, I would delete that portion of the remedy."); *IHS at West Broward*, 338 NLRB 239, 246 (2002) (Member Bartlett, concurring) (criticizing two week minimum as based on speculative rather than actual consequences of failure to engage in effects bargaining); *Kadouri International Foods*, 356 NLRB 1201, 1201 fn. 1 (2011) (Member Hayes would delete portion of remedy requiring minimum of two weeks' pay "without regard to actual losses incurred"). They also observe that the United States Court of Appeals for the District of Columbia Circuit has expressed "concern[]" that the *Transmarine* remedy "may in some respects be punitive rather than remedial." *Sea Jet Trucking Corp. v. NLRB*, 221 F.3d 196, 196 (D.C. Cir. 2000) (unpublished per curiam). Chairman Ring and Member Kaplan would be willing to reconsider the two-week-minimum backpay aspect of the *Transmarine* remedy in a future appropriate case.

ORDER

The National Labor Relations Board orders that the Respondent, Joy Luck Palace Inc. d/b/a Joy Luck Palace Restaurant, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with more onerous working conditions if they engage in activities on behalf of 318 Restaurant Workers Union (the Union).

(b) Temporarily shutting down its dim sum and dinner service because of employees' support for and activities on behalf of the Union.

(c) Failing and refusing to execute, as requested by the Union since about January 1, 2018, a collective-bargaining agreement containing the terms and conditions of employment agreed to on December 21, 2017, for employees in the following bargaining unit:

> All full-time and regular part-time dining room employees including waiters, busboys, and dim sum sellers, and excluding all kitchen employees, office clerical employees, managers, guards and supervisors as defined in the National Labor Relations Act.

(d) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant to and necessary for the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(e) Failing and refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of the unit employees by failing and refusing to bargain over the effects of its decision to close its restaurant.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Execute the collective-bargaining agreement on which the parties reached complete agreement on about December 21, 2017, and give retroactive effect to the terms of that agreement.

(c) Furnish to the Union in a timely manner the information it requested on about May 24, 2018.

(d) On request, bargain collectively and in good faith with the Union concerning the effects of the Respondent's decision to close its restaurant and reduce to writing and sign any agreement reached as a result of such bargaining.

(e) Pay the unit employees their normal wages for the period set forth in the remedy section of the decision, with interest.

(f) Compensate employees who receive backpay under this Order for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, copies of the attached notice marked "Appendix,"[7] in English and simplified Chinese, to the Union and to all unit employees who were employed by the Respondent at any time since September 2017.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 30, 2019

_____
John F. Ring, Chairman

_____
Lauren McFerran, Member

_____
Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
MAILED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to mail and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with more onerous working conditions if you engage in activities on behalf of 318 Restaurant Workers Union (the Union).

WE WILL NOT temporarily shut down our dim sum and dinner service because of your support for and activities on behalf of the Union.

WE WILL NOT fail and refuse to execute, as requested by the Union since about January 1, 2018, a collective-bargaining agreement containing the terms and conditions of employment agreed to on December 21, 2017, for employees in the following bargaining unit:

> All full-time and regular part-time dining room employees including waiters, busboys, and dim sum sellers, and excluding all kitchen employees, office clerical employees, managers, guards and supervisors as defined in the National Labor Relations Act.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant to and necessary for the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT fail and refuse to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of our unit employees by failing and refusing to bargain over the effects of our decision to close the restaurant.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL make employees whole for any loss of earnings and other benefits suffered as a result of our unlawful temporary shutdown of our dim sum and dinner service, plus interest.

WE WILL execute the collective-bargaining agreement on which we reached complete agreement with the Union on about December 21, 2017, and give retroactive effect to the terms of that agreement.

WE WILL furnish to the Union in a timely manner the information it requested on about May 24, 2018.

WE WILL, on request, bargain collectively and in good faith with the Union concerning the effects of our decision to close the restaurant, and WE WILL reduce to writing and sign any agreement reached as a result of such bargaining.

WE WILL pay the unit employees their normal wages for the period set forth in the Decision and Order of the National Labor Relations Board, with interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

JOY LUCK PALACE INC. D/B/A JOY LUCK PALACE RESTAURANT

The Board's decision can be found at www.nlrb.gov/case/02-CA-213541 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.